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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1960.

No. 491.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

CARL McGOWAN,
400 West Madison Street,
Chicago 6, Illinois,
FRANK W. DAVIS,
RAY H. JOHNSON, JR.,
1115 Bankers Trust Building,
Des Moines 9, Iowa,
Attorneys for Respondent.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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Chicago and North Western Railway Company ("North Western"), under Rule 24 of this Court, submits this brief in opposition to the petition for certiorari filed by Chicago, Rock Island and Pacific Railroad Company ("Rock Island").

STATEMENT.

North Western agrees in general with the statement of the case by Rock Island. However, on the issue of whether the rules relied on by Rock Island were of any probative significance in the case, the following additional testimony should be noted.

With reference to the testimony of George J. Mulick he testified that he could not recall a single case where an injury of the kind in question had taken place; that he would not be familiar with the practice of railroads except as to claims coming to a lawsuit involving his territory (R. 46).

As to the testimony of John F. Stewart, he testified that he did not recall any accident involving a personal injury on an interchange track and was not familiar with any case of such character (R. 50, 51).

With reference to the testimony of E. E. Foulks, it should be noted that he had heard of only one injury under the same or similar circumstances as presented herein; that that case was twenty-four years before and that he did not know the disposition made of the case (R. 57).

John J. Clifford testified that the custom and practice of the Rock Island with reference to cases of this character were governed by the opinions of their own Law Department, and that the Law Department could change the custom and practice if they decided to do so (R. 59).

W. R. Hovious, General Claim Agent for the Illinois Central Railroad, testified that he didn't recall any case presenting the same circumstances as this one and that the custom and practice of the Claim Department of the Illinois Central is governed by the recommendations of the Law Department. That customs and practices in the handling of claims change (R. 63).

REASON FOR DENYING WRIT.

There is no federal question involved in this case. The issue here is simply whether the Court below decided a state question in accordance with the applicable law.

The gist of the decision of the Court below was that the right of contribution exists between the two negligent parties causing injury to a third party. The right of contribution is governed by state law regardless of whether the negligence of the parties stems from the Federal Employers' Liability Act or the Safety Appliance Act and regardless of any agreement, custom or practice between the negligent parties. No ground under Rule 19 is involved.

QUESTIONS PRESENTED.

1. Whether the right of contribution between negligent parties is governed by state law.

2. Whether the court below decided the question of the right of contribution in accordance with applicable state law.

ARGUMENT.

I.

The Right of Contribution Between Negligent Parties Is Governed by State Law.

The decision below assumes, without necessarily deciding, that the common law of Iowa governs the right to contribution between joint tort-feasors (See the discussion on pages 31 through 33 in the appendix to the petition for writ of certiorari).

The trial court expressly held that, even though North Western's liability to the injured man was bottomed on and existed because of the Federal Employers' Liability Act, the right to indemnity or contribution was nevertheless governed by applicable state law, relying on the cases of **Ft. Worth & Denver Railway Company v. Threadgill** (5th Cir. 1955), 228 F. 2d 307, 312; **Zontelli Brothers v. Northern Pacific Railway Co.** (8th Cir. 1959), 263 F. 2d 194, and **Waylander-Peterson Co. v. Great Northern Ry. Co.** (8th Cir. 1953), 201 F. 2d 408, 37 A. L. R. 2d 1399. On this question, see also **Kennedy v. Pennsylvania Railroad Co.**, 282 F. 2d 705; **United States v. Acord**, 209 F. 2d 709 and **Chicago, Rock Island and Pacific Railroad Company v. United States**, 129 F. Supp. 637.

No decisions to the contrary have been cited in either the petition herein, or any brief previously filed in the entire course of the litigation.

II

The Court's Decision Below Was in Accordance With Applicable State Law.

The history of the Iowa rule with reference to contribution between joint tort feasors is outlined, on pages 33

and 89 in the appendix to the petition herein, by the trial court, and the history of the Iowa rule appears in the opinion of the circuit court on pages 32 and 33 in the appendix.

In brief, prior to 1956 there was no decision of the Supreme Court of Iowa recognizing the right of contribution between joint tort-feasors. In 1956, to adopt the language of the district court, "out of a clear judicial sky, so to speak", the Iowa Supreme Court, in the case of **Best v. Yerkes** (1956), 247 Iowa 800, 77 N. W. 2d 23, 60 A. L. R. 1354, made the pronouncement that in a proper situation contribution from one joint tort feasor to another could be required.

Because of the recent vintage of the rule, cases interpreting it are not overly abundant. The rule was announced in **Best v. Yerkes**, supra, it was referred to in **Van Tiger v. Hendricks**, 249 Iowa 25, 85 N. W. 2d 543, and the rule has since been applied in the cases of **Constantine v. Scheidel**, 249 Iowa 953, 90 N. W. 2d 10, and **Hawkeye-Security Ins. Co. v. Lowe Construction Co.**, Iowa ...., 99 N. W. 2d 421.

It may be said generally that there is nothing in any of the Iowa cases to indicate that the rights of railroads under these decisions are to be different in any way from other litigants.

The Iowa doctrine, with reference to contribution between joint tort-feasors, requires only a showing that there is (1) no intentional wrong, (2) no moral turpitude, (3) no concerted action by the alleged tort feasors.

In **Best v. Yerkes**, 247 Iowa 800, 77 N. W. 2d 23, 60 A. L. R. 2d 1354, the leading case on the question in Iowa, the Iowa Supreme Court states the requirement for the application of the doctrine in this language found at page 810 of 247 Iowa:

"There is here no claim or showing of an intentional wrong, or of moral turpitude or any concerted action by the alleged tort-feasors. We hold the true rule to be that under such circumstances there is at least a right of equitable contribution between them."

Following the **Best** case, in the case of **Constantine v. Scheidel**, 249 Iowa 953, 90 N. W. 2d 10, the court reiterates the test for the application of the rule, as follows, at page 13 of 90 N. W. 2d:

"Both the tenant and the landlord were negligent in their duty toward the window washer invitee, who was at the time on the premises under joint control by the plaintiff owners and defendant tenants. There is no claim or showing that these parties were guilty of an intentional wrong or of moral turpitude, or any concerted action. Best v. Yerkes, supra. There is no statutory or contractual agreement involved. See Hawley v. Davenport, R. I. & N. W. Ry. Co., 242 Iowa 17, 45 N. W. 2d 513; and cases cited therein. There is little of a persuasive nature that one was more at fault, wrong or remiss in his duty, than the other, so as to bar contribution and permit indemnity."

In the latest case of **Hawkeye-Security Insurance Company, Inc. v. Lowe Construction Co.**, 99 N. W. 2d 421 (Iowa), the court discusses the Iowa rule as follows, at page 424:

"Best v. Yerkes, 247 Iowa 800, 810, 77 N. W. 2d 23, 29, 60 A. L. R. 2d 1354, 1362, after thorough consideration, holds there is at least a right of equitable contribution between joint tort-feasors where there is no intentional wrong, moral turpitude or concerted action between them. Comment on the decision in 42 Iowa Law Review 450, 454, states: 'The logic of the

mitting contribution is that it is obviously unfair to force one defendant to bear an entire loss for which two defendants are equally, unintentionally responsible. The Iowa Court has now taken a stand advocated by legal scholars.'

"The annotation to Best v. Yerkes in 60 A. L. R. 2d 1366, 1377, says: 'The minority—and, it seems, growing—view * * * is this: the rule which bars contribution among joint tort-feasors is not appropriately applied to joint tort-feasors guilty of nothing more than negligence, hence, there is a common-law right of contribution as between such joint tort-feasors.'

"Best v. Yerkes, supra, is followed in Constantine v. Scheidel, 249 Iowa 953, 90 N. W. 2d 10, where equal contribution was enforced in a suit in equity by one joint tort-feasor against another after plaintiff had been compelled to pay the full amount of a judgment in favor of an injured party against them both.

"We have no desire to retreat from our decision in Best v. Yerkes, reaffirmed as it is in Constantine v. Scheidel."

It is respectfully submitted that under these cases, which admittedly represent the governing law, the only requirements for the application of the doctrine of equitable contribution, in Iowa at least, is that there is (1) no intentional wrong, (2) no moral turpitude, or (3) no concerted action between them.

The only thing the Court is called upon to do in this case is to determine, under the facts of the case, the absence of the factors contended for—plus, of course, responsibility to the injured person, and the Iowa rule of contribution is called into play. While each of the courts below have found a "common liability", it is obvious from the decisions that the Iowa rule demands no such qualification.

III.

The decision by the Court below is not of substantial importance.

The only matter presented to the Court is a fact question under the domestic law of Iowa, which can have no far-reaching implications with reference to the railroad industry as the law of but a single state is involved.

The increase in litigation, which is so feared by Rock Island, will result, if at all, not from the decision in the case at bar, but from the fountain-head case of **Best v. Yerkes**, supra, which, of course, cannot be modified in any way by this Court.

The fact that North Western's liability originates under the Federal Employers' Liability Act in no way disturbs the conclusion that its rights against the Rock Island are determined under state law only is well established by the cases cited by the trial court, which were repeated in the second paragraph of this argument. Thus, no interpretation of the Federal Employers' Liability Act or the Safety Appliance Act is called for.

We believe that Chief Justice Taft's statement, quoted by Justice Frankfurter in **Rice v. Sioux City Memorial Park Cemetery, Inc.**, U. S. Iowa 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897, is apropos, wherein it is stated at page 79 of 349 U. S.:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases

where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." **Layne & Bowler Corp. v. Western Well Works, Inc.**, 261 U. S. 387, 393."

CONCLUSION.

It is impossible to tell from the petition on what precise ground the Rock Island seeks to invoke the jurisdiction of this court. It does not flatly state that a federal question is involved, nor does it claim that an important state question has been decided in a way in conflict with the applicable state law. It admits at page 26 that there is no conflict with the decisions of any other court of appeal and admits at page 20 that the law of Iowa allows contribution between negligent parties.

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

CARL McGOWAN,
400 West Madison Street,
Chicago 6, Illinois,

FRANK W. DAVIS,

RAY H. JOHNSON, JR.,
1115 Bankers Trust Building,
Des Moines 9, Iowa,

Attorneys for Respondent